

CHAPTER 3

The Swiss Model of European Integration

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§3.01 INTRODUCTION

Swiss foreign policy was based, after the Second World War, on the maxims of independence, sovereignty, neutrality and autonomy in external trade matters. There was consensus not to join organisations and treaty networks which would endanger these maxims. The export industry profited from bilateral trade agreements and from the demands stemming from the economic recovery in Europe. Switzerland which was only marginally affected by the atrocities of the war was in a good position to prosper. There was no apparent need for a realignment of its foreign policy. Moreover, agricultural products enjoyed protection against excessive competition from abroad which made it difficult to engage in ambitious negotiations on trade liberalisation. Against this background, it is no surprise that Switzerland hesitated to be bound by international law. It was only over time that it was ready to conclude treaties also on matters which went beyond mere technicalities. With respect to global organisations and treaty networks, Switzerland became a contracting party of the General Agreement on Tariffs and Trade (GATT) in 1966. In 1992, Switzerland joined the Bretton Woods institutions, the World Bank and the International Monetary Fund (IMF). In 1995, it was an original member of the World Trade Organization (WTO). In 2002, Switzerland became a member of the United Nations (UN). Switzerland is not a member of the North Atlantic Treaty Organisation (NATO) nor has it joined any other organisation for collective defence.

In a similar vein, Switzerland was reluctant to participate in European organisations and treaty networks after the Second World War. At least, it was an original member of the Organisation for European Economic Co-operation (OEEC) which was founded in 1948 in order to administer the European Recovery Programme (Marshall Plan); in 1961, the OEEC was renamed Organisation for Economic Co-operation and Development (OECD). Switzerland did not participate in the efforts to foster European

integration under the EEC/EC/EU. Membership was inconceivable for Switzerland in particular with respect to the supranational nature of these organisations. Moreover, Switzerland was not in a position to fully understand, let alone actively support, European integration as a peace project. In 1960, Switzerland founded, together with six other European countries, the European Free Trade Association (EFTA); today, EFTA consists of Iceland, Liechtenstein, Norway and Switzerland. In 1963, Switzerland became a member of the Council of Europe which has ever since provided the basic European organisation also for Switzerland. In 1974, it agreed to respect the European Convention on Human Rights (ECHR). In 1972, Switzerland and the EEC concluded a free trade agreement which has been, with respect to trade in goods, the basis for the bilateral relations with the EEC/EC/EU until today. In 1975, Switzerland was an original member of the Conference on Security and Co-operation in Europe (CSCE), renamed to Organisation for Security and Co-operation in Europe (OSCE) in 1994. In 1989, Switzerland and the EC concluded an agreement on direct insurance other than life assurance, granting market access rights in the non-life sector. In 1992, the Swiss people and cantons rejected accession to the European Economic Area (EEA) in a referendum. Prime reasons arguably were the institutional deficits of the arrangement, the fear that free movement of persons would lead to too much immigration and the fact that the Swiss government had applied to become a full member of the European Union (EU) a few months before the referendum, having created the impression that the EEA would only be the first step on the route towards EU membership.¹ After this defining moment of the Swiss policy towards the EU, Switzerland focused, *faute de mieux*, on concluding sectoral agreements with the EU (§3.02), combined with the policy of autonomous adaptation of Swiss law to EU law (§3.03).² This approach, the Swiss model of European integration, has proven successful although it has, time and again, been put into question. Currently, Switzerland faces two major challenges, namely the operationalisation of the mass immigration initiative and the expectation of the EU to conclude an institutional agreement (§3.04).

Overall, the Swiss policy towards the EU has resulted in a substantial integration of Switzerland into the law of the EU, having been described as ‘*de facto* EU membership’ or ‘passive EU membership’.³ These depictions reflect the remarkably close relationship and the multiple interdependences. Politically, culturally and socially, Switzerland and the EU share common values. Geographically, Switzerland is

1. After the decision not to join the EEA, the letter of application remained in Brussels but had no practical effect. In 2015, it was formally withdrawn.
2. See, for accounts of the Swiss-EU relations, STEPHAN BREITENMOSE, Sectoral Agreements between the EC and Switzerland: Contents and Contexts, CMLRev 2003, pp. 1137–1186; CLIVE H. CHURCH (ed.), Switzerland and the European Union: a close, contradictory and misunderstood relationship, London 2007; SANDRA LAVENEX/ RENÉ SCHWOK, The Swiss way: The nature of Switzerland’s relationship with the EU, in: Eriksen/Fossum (eds), The European Union’s non-members: independence under hegemony?, London 2015, pp. 36–51; MATTHIAS OESCH, Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation, Zurich 2018; RENÉ SCHWOK, Switzerland – EU: An impossible membership?, Brussels 2009; the government provides useful information at www.eda.admin.ch/europa.
3. THOMAS COTTIER et al., Die Rechtsbeziehungen der Schweiz und der EU, Bern 2014, n. 998; URS ALTERMATT, Die Schweiz in Europa: Antithese, Modell oder Biotop?, Frauenfeld 2011, p. 155.

located at the heart of the continent. The routes through the country and the Alps are relevant for the transportation of goods between North and South, West and East. Switzerland also plays an important role as an electricity hub for continental Europe. Economically, the interdependence is impressive.⁴ Trade between Switzerland and the EU amounts to CHF 1 billion per day. About 53% of Swiss exports go to the EU; 72% of the imports come from the EU. Most relevant are, of course, exports to and imports from the neighbouring countries Austria, France, Germany and Italy. Every fourth inhabitant in Switzerland is a foreigner. More than two-third of these foreign nationals are EU citizens. More than 300,000 commuters travel across the borders to and from Switzerland, often on a daily basis. *Vice versa*, Switzerland is more important for the EU than one would guess at first sight. In absolute terms, Switzerland is, after the United States, China and Russia, the fourth most important trading partner of the EU.

§3.02 BILATERAL AGREEMENTS

[A] Overview

Switzerland and the EU have developed, over decades, a tight network of bilateral agreements. Some twenty main agreements are supplemented by more than 100 (secondary) agreements, protocols and exchanges of letters. These agreements have been concluded on the grounds of specific needs and demands, profiting from windows of opportunities. They do not form a comprehensive and coherent system. In addition to the Free Trade Agreement of 1972 and the Insurance Agreement of 1989, the two sets of bilateral agreements of 1999 and 2004, the 'Bilaterals I' and the 'Bilaterals II', provide the basic legal framework for the relationship between Switzerland and the EU:

- The Bilaterals I consist of seven agreements, mainly dealing with market access (free movement of persons, public procurement, technical barriers to trade, trade in agricultural products, land transport, air transport, research). These agreements are tied together by a guillotine clause; the termination of one agreement automatically leads to the termination of the others.
- The Bilaterals II consist of nine agreements and, partly, go beyond market access, also dealing with justice and home affairs and co-operation in culture, education and environmental matters (Schengen/Dublin, taxation of savings, fight against fraud, trade in processed agricultural products, MEDIA, environment, statistics, pensions of former EU officials, education and youth programmes). The Bilaterals II do not contain a guillotine clause; only the Schengen/Dublin Association Agreements share a common fate.
- Since 2004, only a few agreements could be concluded, among them being an agreement on customs facilitation and security, substantially revising an older version (1990/2009), and an agreement on the cooperation of competition authorities (2013). Moreover, Switzerland participates in various EU agencies

4. See, for these figures, <https://www.eda.admin.ch/eda>.

and programmes, among them being Europol, Eurojust, the European Border and Coast Guard Agency (Frontex) and the European Aviation Safety Agency (EASA). Such participation allows Swiss representatives to be integrated into EU transgovernmental structures. Swiss representatives are informed about ongoing actions and can influence the work, mainly by relying on the power of the pen (decision shaping). Naturally, they do not possess voting rights (decision-making).

In 2006, Switzerland accepted the view of the EU according to which non-EU Member States which profit from the common market (EEA/EFTA states, Switzerland) should also contribute to the EU cohesion policy. Therefore, Switzerland decided to spend CHF 1 billion for projects mainly in Eastern Europe, over a period of ten years ('cohesion billion'). All in all, the sum amounted to CHF 1.3 billion.⁵ Legally speaking, this was a measure decided by Switzerland on its own. Politically, of course, it was kindly proposed, and strongly expected, by the EU which considers the Swiss contribution to be part of the 'entry ticket' for access to the common market. The EU has made it clear repeatedly that it expects Switzerland to renew its financial contribution.⁶ To this effect, the Federal Assembly put into force the Federal Act on Cooperation with Eastern European countries, laying down the provisions for the renewal of the Swiss contribution. In November 2017, the Federal Council announced that it will commence the necessary groundwork for the Federal Assembly to decide on the means for the financing of the measures.

Currently, exploratory discussions and negotiations are under way to deepen cooperation in other areas. *Inter alia*, Switzerland and the EU negotiate on the conclusion of an agreement on energy. Moreover, it has been repeatedly suggested to negotiate an agreement on (financial) services. However, there have not been serious efforts to this effect.⁷ Today, services are covered only punctually by the Insurance Agreement of 1989, the Agreement on the Free Movement of Persons of 1999, the Agreement on Air Transport of 1999, the Agreement on the Carriage of Goods and Passengers by Rail and Road of 1999 and the Agreement on Certain Aspects of Government Procurement of 1999. In any case, the EU has made it clear that it is only ready to conclude new agreements on market access if Switzerland agrees to conclude an institutional framework agreement (§3.04[B]).

5. This sum is approximately 2/3 of Norway's contribution to the EU cohesion policy, see Hugo BRUGGMANN/ULRICH STÜRZINGER, *Der Schweizer Erweiterungsbeitrag in einem veränderten Umfeld – Stand und Ausblick*, *Die Volkswirtschaft* 12-2014, pp. 38, 42.

6. Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 Dec. 2014, n. 54.

7. Positions within Switzerland, with respect to both market access demands and protectionist interests (such as the originally 'non-negotiable' but in the meantime outdated banking secrecy), have been too diverse. Moreover, discomfort as to the consequences of the adoption of flanking policies, such as consumer protection, competition and state aid law, have played a role to remain passive. Lastly, Article V of the GATS requires that agreements on trade in services have 'substantial sectoral coverage' which complicates the matter further.

[B] A Closer Look at Some Agreements

A closer look at some of the bilateral agreements reveals that the agreements do not follow a standard pattern. Some agreements, such as the Free Trade Agreement of 1972, are traditional (trade) agreements, dealing with market access and co-operation, without envisaging the integration of Switzerland into the EU legal order. Other agreements, such as the Agreement on the Free Movement of Persons of 1999 (whose Preamble explicitly foresees 'to bring about the free movement of persons between [the parties] on the basis of the rules applying in the European Community'), the Agreement on Air Transport of 1999 and the Schengen/Dublin Association Agreements, are substantially based on EU law. They refer extensively to EU secondary law and need, accordingly, to be updated periodically in order to keep up with the developments in the EU. They envisage the approximation of Swiss law to EU law and result in a substantial harmonisation:

- The Free Trade Agreement of 1972 – a free trade agreement pursuant to Article XXIV of the GATT – provides the backbone of the bilateral relations with respect to trade in goods. It prohibits customs duties and similar measures as well as quantitative restrictions for industrial goods and some processed agricultural products. At the same time, it permits the parties to pursue policy objectives other than trade liberalisation, such as the protection of public morals, human and animal health and life and the environment. It contains provisions on flanking policies, such as the prohibition of cartels and state aid. The agreement is not based on EU law (although some provisions are drafted in a similarly way as the provisions on the free movement of goods in the EEC Treaty). It is supplemented by some 130 additional protocols, decisions and exchanges of letters.
- The Agreement on the Free Movement of Persons of 1999 enables Swiss and EU citizens to choose their workplace and residence freely within the territories of the contracting parties if they have a valid work contract, are self-employed or can prove their financial independence and health insurance coverage. Importantly, the agreement does not cover all the rights which EU citizens enjoy under EU law. The freedom of establishment only applies to natural persons; juridical persons, such as firms and companies, do not profit from the rights granted to self-employed persons. Moreover, the right to provide services is limited to a period of ninety days per year. The agreement provides for non-discrimination and contains a standstill clause according to which it is not allowed to introduce new restrictions to the detriment of the nationals of the other contracting parties. Annexes II and III deal with the coordination of the systems of social security and the mutual recognition of professional qualifications. To this effect, they refer extensively to EU secondary law. These rights have been 'extended' to persons in Switzerland, 'a State

treated as a Member State for the purposes of [these regulations and directives]'.⁸ From the perspective of EU law, the Agreement on the Free Movement of Persons is a mixed agreement; therefore, it needed to be ratified not only by the EU but also by the Member States which henceforth have also become parties to the agreement.

- The Agreement on Air Transport of 1999 grants commercial flying rights to companies having their seat in Switzerland and the EU. It provides for non-discrimination and prohibits cartels and state aid. It enables Switzerland to participate in the EASA which takes decisions on specific matters, such as the certification and approval of products and organisations, also vis-à-vis Switzerland. The agreement refers extensively to EU secondary law, concerning, e.g., passenger rights in the event of cancellation/delays of flights (Regulation 261/2004).
- The Schengen/Dublin Association Agreements allow Switzerland to participate in the Schengen and Dublin arrangements in a membership-similar way. The Schengen agreement ensures that Switzerland is an associated member of the Schengen *acquis* which is based, in particular, on the Schengen Agreement of 1985, the Convention implementing the Schengen Agreement of 1990 and the Schengen Borders Code of 2006. Switzerland profits from the abolishment of identity checks at the Schengen internal borders. It participates in cross-border cooperation, *inter alia* by having access to the Schengen Information System II (SIS II), in the common visa policy for stays up to three months (Schengen visa) and in the European Border and Coast Guard Agency (Frontex). The Dublin Association Agreement coordinates national responsibilities for asylum procedures, referring to the Dublin III regulation. It grants access to the Eurodac finger print data bank.

[C] Institutional Setting

The institutional setting of the agreements is remarkably exiguous. They follow traditional patterns of public international law, based on a classic understanding of state sovereignty. A two-pillar approach applies. Each party is on its own responsible for the good functioning of the agreements. This holds true with respect to the implementation of the agreements as well as their interpretation and application. The parties meet periodically in joint committees in order to discuss pending issues and to solve, ideally, dissonances, deciding by consensus. There is no common surveillance authority, such as the EU Commission and the EFTA Surveillance Authority, examining whether the parties interpret and apply the agreements correctly. There is no common arbiter, such as the ECJ and the EFTA Court, rendering authoritative judgments in the

8. Judgment United Kingdom/Council, C-656/11, EU:C:2014:97, n. 63; Judgment Kik, C-266/13, EU:C:2015:188, n. 44.

case of disagreement between the parties.⁹ Consequently, it is the ECJ and the Swiss Federal Supreme Court which interpret the agreements as courts of last instance for the EU and Switzerland, respectively. The courts tend to interpret bilateral norms, which are based on EU law, in light of the ECJ's case law on EU law, applying the teleological method of interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties. This holds in particular true for the Swiss Federal Supreme Court which only deviates from pertinent ECJ judgments if there are cogent reasons to do so.¹⁰ To date, there has not been a case in which the Swiss Federal Supreme Court determined that such a cogent reason existed.

For the good functioning of the agreements, it is pivotal that revisions of EU secondary law which is, by reference, also applicable bilaterally, find their way into the bilateral *acquis*. In the field of technical regulations, for instance, it is a matter of routine to update the agreements regularly. The same holds true for the Schengen Association Agreement which has been updated more than 200 times since 2004.¹¹ However, except for the Schengen/Dublin Association Agreements, the bilateral agreements do not provide for a specific mechanism for the adoption of EU secondary law.¹² They do not stipulate time limits nor do they deal with the consequences if a party fails to adopt a new regulation or directive. The system reminds of a fair weather construction; it lacks legal security, transparency and efficiency. At least, the absence of specific provisions to this effect allows Switzerland to refuse the adoption of a regulation or directive if it does not deem such an adoption useful or necessary for the good functioning of the agreement concerned; for instance, Switzerland has constantly refused to enter into negotiations on the incorporation of the Citizens' Rights Directive 2004/38/EC into the bilateral *acquis*. *Vice versa*, it is problematic for Switzerland when the EU refuses to proceed with the adoption of EU secondary law in order to build up pressure on Switzerland to act according to EU demands in other dossiers; this has been the case in 2016/2017 when the EU delayed the process to update the Agreement on Mutual Recognition in Relation to Conformity Assessment of 1999 apparently in order to urge Switzerland to implement the mass immigration initiative in a way so as not to violate the Agreement on the Free Movement of Persons (§3.04[A]). As a

9. The Agreement on Air Transport of 1999 provides for an exception; with respect to certain rights and obligations, the EU Commission and the ECJ are responsible for the surveillance and judicial review also vis-à-vis Switzerland.

10. See BGE 136 II 5; the same presumption for a parallel interpretation is arguably applied by the ECJ although it consistently refers to the *Polydor* judgment (270/80, EU:C:1982:4, n. 14-16) according to which the interpretation given to the provisions of EU law concerning the internal market cannot be automatically applied by analogy to the interpretation of a bilateral agreement, unless there are express provisions to that effect laid down by the agreement itself, see Judgment Grimme, C-351/08, EU:C:2009:697, n. 29; MARJA-LIISA ÖBERG, From EU Citizens to Third-Country Nationals: The Legacy of *Polydor*, in: Birkinshaw/Biondi (eds), *Britain Alone! – The Implications and Consequences of United Kingdom Exit from the EU*, 2016, pp. 199, 206–208.

11. At www.eda.admin.ch/dea and Link to bilateral agreements/Schengen.

12. The Schengen/Dublin Association Agreements contain provisions to the effect that the continuation of both agreements (which are interlinked with a guillotine clause) is seriously put at risk if Switzerland fails to adopt a new Schengen- and/or Dublin-relevant regulation or directive. Therefore, when the people approved the incorporation of Council Regulation (EC) No. 2252/2004 (biometrics in passports and travel documents) into the Schengen Association Agreement with 50.1% of the votes in 2009, many breathed a sigh of relief.

corollary to the ongoing adoption of EU secondary law, Swiss representatives are usually consulted when the EU prepares new regulations and directives which are relevant bilaterally (decision-shaping). Swiss experts can usually also participate in the preparatory work for the enactment of implementing measures by the European Commission (comitology). Naturally, however, Swiss representatives and experts do not possess voting rights (decision-making).

In general, the bilateral agreements work well. Dissonances are usually resolved by political means. The agreements are usually updated in a satisfactory way. At the same time, the current institutional setting is not ideal. The substance of the (majority of) the agreements and their form do not match. Therefore, Switzerland and the EU have been negotiating, since 2014, an institutional framework agreement in order to provide those agreements which deal with market access and are based on EU law with a new institutional framework (§3.04[B]).

§3.03 AUTONOMOUS ADAPTATION OF SWISS LAW TO EU LAW

In addition to the bilateral agreements, Switzerland has adopted another instrument in order to mitigate the negative consequences of not being a member of the EU or the EEA, namely the policy of autonomous adaptation of Swiss law to EU law.¹³ This policy has been dominating the law-making process in Switzerland since the late 1980s when the Federal Council stated:

Our goal has to be to secure greatest compatibility of our legislation with the legislation of our European partners in the areas of cross-border significance (and only there). (...) This pursuit of parallelism is not motivated by the introduction of an automatism to adopt European law, but by the prevention of unwanted and unnecessary legal differences, which hamper the aspired mutual recognition of legislation on a European level.¹⁴

Deviations from EU regulations and directives are, of course, possible. However, they shall only be chosen if there are cogent political and/or economic reasons to do so, also in light of the two objectives which the policy of autonomous adaptation pursues, namely:

- (1) to mitigate the negative consequences of not being a member of the EU or the EEA and to strengthen the competitiveness of the Swiss economy; and

13. S. ROY GAVA/PASCAL SCIARINI/FRÉDÉRIC VARONE, *Twenty Years After the EEA Vote: The Europeanization of Swiss Policy-Making*, SPSR 2014, pp. 197–207; FRANCESCO MAIANI, *Lost in translation: euro compatibility, legal security, and the autonomous implementation of EU law in Switzerland*, E.L. Rev. 2013, pp. 29–35.

14. Bericht über die Stellung der Schweiz im europäischen Integrationsprozess vom 24. August 1988, BBl 1988 III 249, 380 (own translation).

- (2) to be ready to choose the European integration policy option which suits Switzerland best, including, at least according to the Federal Council in 1993, EEA or EU membership.¹⁵

In practice, the policy of autonomous adaptation has led to a systematic adoption of EU law. At the same time, it is difficult to measure, quantitatively and/or qualitatively, the impact of EU law in Switzerland. Scholars estimate that 30%–50% of all federal acts and ordinances are influenced by EU law, directly or indirectly.¹⁶ One of the earliest, and still most illustrative, examples concerned the introduction of the summer time under the auspices of the EEC in the early 1980s; Switzerland, of course, has followed suit ever since. Other typical examples concern acts and ordinances on technical regulations and standards, cartels and other anticompetitive practices, medicines, food, equal treatment of men and women, value-added tax, intellectual property, data protection and financial markets. These examples indicate that the autonomous adaptation of Swiss law to EU law is by far not limited to legislation with cross-border significance anymore. EU law is relevant in almost all areas of law. It has infiltrated the Swiss legal order across the board, accelerated by spill over effects.

In 2010, the policy of autonomous adaptation of Swiss law to EU law reached a new dimension. Switzerland introduced the *Cassis de Dijon*-principle applicable to products originating in the EU/EEA. Importantly, Switzerland did so on its own, i.e. unilaterally, by amending the Federal Act on Technical Barriers to Trade. Products which are legally placed on the market in the EU and in the EEA countries Iceland, Liechtenstein and Norway can be marketed and sold in Switzerland without necessarily meeting the relevant Swiss technical regulations and standards. Special provisions apply to food. Moreover, the Federal Council has specified those products which do not profit from the principle. Systemically, it is interesting to note that the principle logically entails a prospective effect in the sense that it also encompasses future developments in the EU/EEA and their Member States. This goes beyond the traditional mode of integration according to which EU law finds its way into the Swiss legal order statically, i.e. as valid on a specified day. From an economic viewpoint, however, new data suggest that the practical effect of the measure has been, so far, only marginal.

§3.04 MAJOR CHALLENGES

[A] Popular Initiative 'Against Mass Immigration'

In 2014, the people and the cantons approved the popular initiative 'against mass immigration'. According to the new Articles 121a and 197(11) of the Constitution, Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market.

15. Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens vom 24. Februar 1993, BBl 1993 I 805, 810.

16. MATTHIAS OESCH, Die Europäisierung des schweizerischen Rechts, ZSR-Beiheft 50, 2012, pp. 13, 30.

International treaties which are not compatible with these provisions shall be renegotiated within three years. These provisions, read together, are obviously directed against the Agreement on the Free Movement of Persons of 1999 although they do not explicitly refer to this agreement, let alone mandate the government to terminate it.

Logically, the Federal Council and the Federal Assembly had three options to operationalise the new provisions:

- The Federal Council tried to renegotiate the Agreement on the Free Movement of Persons with the EU. However, the EU made it clear that it was not willing to renegotiate the agreement to the effect that quotas and a discriminatory priority system for Swiss citizens would be permitted; it has confirmed this position in 2017, i.e. after the people in the United Kingdom voted in favour of leaving the EU.¹⁷ The EU has only been ready to discuss 'practical problems related to the implementation of the Agreement'.¹⁸
- The Federal Council, arguably after involving the Federal Assembly, could terminate the Agreement on the Free Movement of Persons. This, however, was not a preferred option for a majority of the Federal Council and the Federal Assembly. Moreover, the termination of this agreement would have automatically resulted in the termination of the other agreements of the 'Bilaterals I', on the grounds of the guillotine clause.
- The Federal Assembly could implement the new provisions in a way so as not to violate the Agreement on the Free Movement of Persons. In fact, this is what the Federal Assembly did. It adopted a mechanism to grant local workers priority on the job market ('*Inländervorrang light*', Article 21a of the Federal Act on Foreign Nationals). According to the new legislation, in economic sectors or regions where the unemployment rate is above the overall average, access to the information of new employment opportunities is restricted to persons (Swiss and EU citizens) that are registered at the public service for employment of the cantons.

With a view to the Swiss policy towards the EU, this outcome has been welcomed by most commentators. The risk to endanger the continuation of the bilateral way in its current form has been, at least for the time being, dispelled. From a constitutional law perspective, however, the outcome is problematic. The wording of the new provisions is clear; the implementing legislation fails to reflect this properly. At least, the parliament's implementation is in line with a recent landmark decision of the Federal Supreme Court of 2015 according to which the Agreement on the Free Movement of Persons takes precedence over federal acts in the case of a conflict.¹⁹ According to the Federal Supreme Court, this holds also true when the Federal Assembly would

17. See, e.g., Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, 16 Dec. 2014, n. 45; Council conclusions on EU relations with the Swiss Confederation, 28 Feb. 2017, n. 2.

18. Letter of Catherine Ashton, High Representative and Vice President of the Commission, to Didier Burkhalter, President of the Swiss Confederation, of 24 July 2014, www.eda.admin.ch/dea and link to free movement of persons.

19. BGE 142 II 35.

intentionally violate the agreement and would be ready to face the legal and/or political consequences of such an action. Thus, implementing legislation, which violates the agreement, would have no practical effect anyway.

Shortly after the people and the cantons had approved the new constitutional provisions, a group of persons launched a new popular initiative in order to reconsider the matter. They successfully collected more than 100,000 signatures for their initiative 'out of the dead end' ('Raus aus der Sackgasse') which provided for the deletion of the newly introduced Articles 121a and 197(11). However, the initiative committee withdrew the initiative, in late 2017, and the people and the cantons do not have the possibility to vote on the matter again – which is regrettable. Irrespective thereof, the Swiss People's Party (SVP) and its ally, the Action for an independent and neutral Switzerland (AUNS), have announced plans to launch a popular initiative which would provide for the termination of the Agreement on the Free Movement of Persons.²⁰ In principle, such an initiative would provide a welcomed opportunity to conclude the ongoing debate on the fate of this agreement, and the matter would be, at least for the time being, settled.

[B] Institutional Framework Agreement

The EU has made it clear, since 2008, that it expects Switzerland to agree to an institutional agreement, providing for common rules on the dynamic updating of the agreements, the consistent interpretation of the agreements in Switzerland and the EU, the supervision of their correct interpretation and application, and dispute resolution. An institutional agreement would apply to existing and new market access agreements which are based on EU law.²¹ The EU has made the conclusion of new market access agreements, such as an agreement on electricity (on which Switzerland and the EU have been negotiating since 2007) and an agreement on financial services (on which exploratory discussions have been held), conditional upon the conclusion of an institutional agreement.

Since 2014, negotiations have been under way. The two most controversial issues concern the adoption of new EU law and dispute resolution.²² With respect to the former, the Swiss Federal Council declared, when it presented the basic elements of the negotiation mandate, that it will not accept an obligation to adopt EU law automatically:

20. At www.svp.ch; www.auns.ch.

21. At www.eda.admin.ch/dea and link to negotiations and open issues; see also JEAN-CLAUDE PIRIS, Which Options Would Be Available for the United Kingdom in the Case of a Withdrawal from the EU?, in: Birkinshaw/Biondi (eds), *Britain Alone! – The Implications and Consequences of United Kingdom Exit from the EU*, 2016, pp. 111, 122–124; CHRISTA TOBLER, One of Many Challenges After 'Brexit': The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?, *Maastricht Journal of European and Comparative Law* 2016, pp. 575–594.

22. Moreover, negotiations on rules on state aid also seem to be controversial; however, no public information is available on this issue.

The chosen solution contains no automatic adoption of EU law. Switzerland must have the option of deciding, subject to all national processes (such as a referendum), whether to adopt any new EU legislation by means of a bilateral agreement.²³

With respect to dispute resolution, the Swiss Federal Council has proposed to seek an arbitration solution:

Regarding the issue of dispute settlement, the Swiss negotiators will be seeking an arbitration solution that could be triggered if the joint committee concerned is unable to resolve matters.²⁴

Arguably, such an arbitration panel would be required to request the ECJ to give a ruling where a dispute concerns the interpretation of a bilateral provision which is based on EU law.²⁵ Therefore, in Switzerland, this proposal is hotly debated. Some observers would have favoured the EFTA Court to be involved, rather than such an arbitration panel (and the ECJ).

Originally, Switzerland was reluctant to enter into negotiations on an institutional agreement. Meanwhile, the perception has grown also in this country that there are valid arguments in favour of a new institutional framework for the increasingly complex treaty network. Legal security, transparency and efficiency would be enhanced. There would be a mechanism for the revision of the annexes of the agreements, thus ensuring that the updating of the agreements is done in a timely and uncomplicated manner (at least on the part of Switzerland whereas the risk that the EU does not proceed with the adoption of EU law into an agreement would probably continue). The EU and Switzerland would have a right to bring disputes before a juridical body, presumably an arbitration panel. Switzerland would not depend exclusively on the goodwill of the EU in resolving disputes anymore as is the case today. An institutional agreement would contribute to the further juridification of the Swiss model of European integration and thus to the rule of law. It would reflect the changing legal nature of those agreements which do not constitute classic public international law instruments anymore but envisage the sectoral integration of Switzerland into the legal order of the EU, granting Switzerland a membership-similar status in selected areas. Moreover, the final outcome will need to be assessed in light of the EU's stance that it is not ready to further pursue and develop the bilateral way in its current form without an institutional agreement.

At the same time, an institutional agreement would likely increase the democratic deficit which is detectable already under the current setting. Law-making is de facto delegated in relevant areas to the EU. The Federal Council, the Federal Assembly and,

23. Pressemitteilung des Bundesrates vom 18. Dezember 2013: Beziehungen Schweiz-EU: Bilateralen Weg durch Verhandlungen über institutionelle Fragen stärken, www.eda.admin.ch and link to Medien (own translation).

24. Pressemitteilung des Bundesrates vom 5. März 2013: Beziehungen zur EU: Der Bundesrat zieht Bilanz und präzisiert das Verhandlungsmandat, www.eda.admin.ch und link to Medien (own translation).

25. The ECJ has consistently held that it does not accept any other court which authoritatively interprets EU law, including EU law which has been incorporated into a treaty with a third country, also for the EU, see Opinion EEA I, 1/91, EU:C:1991:490.

in the case of referenda, the people usually do not possess another option than to approve the incorporation of a new EU act into an agreement irrespective of whether such a novelty is considered desirable or not. Depending on the content of the institutional agreement, the tension between (direct) democracy and European integration might be further accentuated. As problematic as it may be, this might be the price to be paid by Switzerland for privileged access to the common market as a third country.

§3.05 CONCLUSION

For a tentative assessment of the Swiss model of European integration, two observations are most noteworthy. First, the double strategy to conclude sectoral agreements and to align Swiss law autonomously to EU law has enabled Switzerland to prosper and, at the same time, to remain outside of the EU and the EEA. The tight network of agreements provides the backbone, granting rights to persons and companies in Switzerland similar to those granted to citizens of EU/EEA Member States and companies having their seat in the EU/EEA in selected areas. Switzerland continues to pursue its own policies in areas which are not covered by the bilateral *acquis*. Moreover, Switzerland profits from the autonomy in external trade relations. In addition to EFTA and the Free Trade Agreement with the EU, Switzerland has concluded twenty-eight free trade agreements with thirty-eight partners around the globe, including agreements with the Ukraine, Turkey, Israel, Egypt, Mexico, Singapore, Chile, the Republic of Korea, SACU (incl. South Africa), Canada, Japan and China.²⁶ In this respect, the assessment is markedly positive.

Second, the Swiss model is currently under construction. Switzerland needs to come to terms with the expectation of the EU to agree to a new institutional basis applicable to market access agreements based on EU law. Such an agreement is a logical element to consolidate and further develop the bilateral approach. At the same time, the introduction of a mechanism for the dynamic incorporation of EU secondary law into the bilateral *acquis* and the (indirect) engagement of the ECJ to settle disputes would be a further step of integration. Advantageous as it may be, there is also a price tag attached to the package. Against this background, the planned conclusion of an institutional agreement provides a welcomed opportunity to assess whether the Swiss model of European integration still provides the Swiss *Königsweg*, the Swiss King's way, or whether another instrument might be more auspicious to safeguard the interests of Switzerland best. Alternatives might range from new forms of integration, developed, e.g., in the process of the Brexit negotiations, to full EU membership.

26. The main objective of such agreements is not only to improve market access per se but also to ensure that Swiss companies enjoy market access conditions at least as favourable as those enjoyed by their main competitors located in the EU. Therefore, the conclusion of CETA has led Switzerland to try to renegotiate specific elements of the agreement with Canada. The possible – albeit, at least at the moment, hardly realistic – conclusion of TTIP would result in even more obvious disadvantages for Swiss companies vis-à-vis their counterparts in the EU.

Brexit: The Legal Implications

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